89-1938

Supreme Court, U.S.
FILED
MAY 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

Case No. _____

UNITED STATES SUPREME COURT

1990 Term

JOSEPH C. KIRCHDORFER and SKIP KIRCHDORFER, INC.,

Petitioners

v.

SECRETARY, U.S. DEPARTMENT OF LABOR,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

APPENDIX

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NOT RECOMMENDED FOR PUBLICATION

No. 89-5778

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH C. KIRCHDORFER and SKIP KIRCHDORFER, INC.,	)	
Plaintiffs-Appellants,	)	
	)	ON APPEAL
	)	FROM THE
v.	)	UNITED
	)	STATES
	)	DISTRICT
SECRETARY, U.S. DEPARTMENT OF LABOR,	)	COURT FOR
	)	WESTERN
	)	DISTRICT OF
Defendant-Appellee.	)	KENTUCKY.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to prominently displayed if this decision is reproduced.

Decided and Filed _____

BEFORE: MILBURN and NORRIS, Circuit Judges; CONTIE, Senior Circuit Judge

PER CURIAM. Plaintiffs, Joseph C. Kirchdorfer and Skip Kirchdorfer, Inc., appeal from the order of the district court granting summary judgment to defendant, Secretary of the United States Department of Labor.

Having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of the parties, we are unable to say that the district court erred in granting summary judgment to defendant.

As the issuance of a written opinion by this court would be duplicative and serve no useful purpose, in view of the district court having articulated the reasons why judgment should be entered for defendant, the judgment of the district court is **affirmed** upon the reasoning set out by that court in its

opinions of March 1, 1989 and May 26, 1989.

MANDATE: issued 3/30/90

COSTS: taxed (appellee to recover $207.00)

A TRUE COPY
Attest: Leonard Green, Clerk

By: /s/ C.B. Orkoweeki
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JOSEPH C. KIRCHDORFER, et al.,
Plaintiffs,

v. No. C 88-0771-L(B)

ELIZABETH DOLE, in her capacity
as SECRETARY OF THE U.S. DEPARTMENT OF
LABOR,
Defendant.

O R D E R

For the reasons set forth in the memorandum filed this date,

IT IS ORDERED that the motion of the defendant, Elizabeth Dole, in her capacity as Secretary of the U.S. Department of Labor, for summary judgment be and it is hereby granted, and this action be and it is hereby dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable order.

This 26th day of May, 1989.

/s/ Thomas A. Ballantine, Jr.

THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to Counsel

Entered May 26, 1989

Jesse w. Grider, Clerk

By _____
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JOSEPH C. KIRCHDORFER, et al.,
Plaintiffs,

v. No. C 88-0771-L(B)

ELIZABETH DOLE, in her capacity as SECRETARY OF THE U.S. DEPARTMENT OF LABOR,
Defendant

MEMORANDUM

Plaintiffs, Joseph C. Kirchdorfer and Skip Kirchdorfer, Inc. (Kirchdorfer), brought this action against the defendant, Elizabeth Dole, in her capacity as Secretary of the U. S. Department of Labor[1] (Secretary), for declaratory and injunctive relief and review of a final administrative decision by the United States Department of Labor (DOL). After a formal hearing, Kirchdorfer was found in Violation of the

[1] This case was originally filed against Ann McLaughlin, Elizabeth Dole's predecessor as Secretary of Labor. F.R.Civ.P. 25(d) (1).

McNamara-O'Hara Service Contract Act of 1965, as amended (the SCA), Title 41 U.S.C. § 351 et seq., the Contract Work Hours and Safety Standards Act (the C.W.H.S.S.A.), Title 40 U.S.C. 327-332, and the regulations at 29 C.F. R. Parts 4 and 6. The ALJ recommended that plaintiffs' name be placed on the Comptroller General's list of debarred bidders, thereby prohibiting plaintiffs from bidding on and obtaining government contracts for a period of three years. The ALJ's findings and recommendations were affirmed by the Deputy Secretary of Labor. This action is now before the Court on the motions of the parties for summary judgment. F.R.Civ.P. 56.

Plaintiffs contend that the ALJ's decision was arbitrary and capricious because it was based on insufficient evidence and the ALJ improperly

interpreted the applicable regulations. Plaintiffs also complain that the final decision of the Deputy Secretary did not reflect the plaintiffs' post-hearing brief, but was simply a "rubber stamp" of the ALJ's allegedly erroneous findings and recommendations.[2] Plaintiffs state that they have appealed from the Deputy Secretary's final decision in order to obtain an objective review of the administrative record.

The scope of judicial review is governed by Title 41 U.S.C. § 353 which provides that the ALJ's findings of fact shall be conclusive if supported by a preponderance of the evidence. Midwest Maintenance & Construction Company v. Vela, 621 F.2d 1046, 1048 (10th Cir.

[2] The Deputy Secretary's opinion consisted of 20 pages in which each allegation of error was addressed.

1980). The standard of judicial review is governed by Title 5 U.S.C. 706(2)(A) which authorizes a reviewing court to set aside an agency decision only if it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. In questions of interpretation of regulations, a reviewing Court must show great deference to the interpretation given by the agency charged with the administration of the regulations. Train v. Natural Resources Defense Council, 421 U.S. 60, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975). A reviewing court must follow the agency's interpretation of its regulations unless such interpretation is clearly erroneous. March Oil Co. v. Lee, 241 P. 804, 113 Ok. 242, cert. denied, 270 U.S. 658, 46 S.Ct. 354, 70 L.Ed. 785 (1924).

In Chevron, U.S.A. Inc. v. Natural

Resources Defense, 467 U.S. 837, 104 S.Ct. 2778 (1984), the Court articulated the function of a court faced with review of an agency's construction of the statute which it administers:

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' Morton v. Ruiz, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Fed.2d 270 (1974). If Congress has explicitly left a gap for the agency to

fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

467 U.S. at 842, 104 S.Ct. at 2781.

The administrative hearing was held on March 3, 1986. In addition to documentary evidence, the ALJ heard testimony on behalf of DOL from two Wage and Hour Division compliance officers, an Air Force contract administrator and several of plaintiffs' employees; Joseph Kirchdorfer testified on his own behalf. Certain testimony of Kirchdorfer was not documented and much of it was contradicted by DOL's witnesses. The plaintiffs object to the determination of the ALJ to discredit Kirchdorfer's

testimony in the face of conflicting evidence.

It is not the function of a reviewing court to decide the credibility of witnesses unless the record reflects that the ALJ was clearly erroneous in doing so. NLRB v. Jacob E. Decker and Sons, 569 F.2d 357 (5th Cir. 1978) . It was not clearly erroneous for the ALJ to find, based on witness testimony, that Neal O'Donnell had not received vacation pay; John Milham and James Rudolph had not received earned overtime pay; Nelson Longcrier's job had been misclassified; a contract administrator had met with plaintiffs' supervisory personnel to explain the proper conformance procedures and the requirement of paying subsequently classified employees the determined wage rate and that Charles Cook, John Davies, Hal Jones, Angela

Smith, Julie Tatum and Christine Chodnicki were not paid the contractual conformed wage rates for the jobs they performed and that Kirchdorfer had represented to certain employees of the predecessor contractor that they were to be hired as continuous employees. Plaintiffs argue that their right to due process of law was violated by the ALJ's acceptance of documentary evidence submitted by DOL after the hearing. The evidence was submitted in response to Kirchdorfer's testimony regarding a new matter and showed that plaintiffs' employee, Frank Krzynowek, had worked continuously for the predecessor contractor before he was hired by the plaintiffs. Kirchdorfer had previously testified that he had telephoned the predecessor contractor and was told that Krzynowek had been fired a month before

the predecessor contractor's contract was terminated.[3] Plaintiffs complain that the submission of such evidence is impermissible because there was no opportunity to "cross-examine" or limit the evidence.

Agencies are not bound by the strict rules of evidence governing jury trials. Under Title 5 U.S.C. § 556(d), an agency need only exclude "irrelevant, immaterial or unduly repetitious evidence."

Plaintiffs do not argue that the evidence lacked relevancy, competency or materiality. They have not shown how the evidence could have been limited and there is no claim that the plaintiffs attempted to refute the evidence after its submission and before the ALJ's

[3] It must be noted that Kirchdorfer's testimony would be inadmissible as hearsay in a suit between private parties. Fed.R.Evid. 802.

ruling. The evidence did not directly contradict Kirchdorfer's testimony that he had received certain information over the telephone, but simply established that Krzynowek was employed during the time Kirchdorfer was told he had been terminated. Plaintiffs argue, in the alternative, that the documentary evidence supported Kirchdorfer's testimony by showing a break in Krzynowek's employment during the relevant time period and therefore the ALJ's determination that Krzynowek was employed prior to being hired by Kirchdorfer was arbitrary and capricious.

It was not arbitrary or capricious for the ALJ to find that a break in employment did not constitute a "firing."

The ALJ's findings that wage violations had been committed by plaintiffs are supported on the record by a

preponderance of the evidence.

Plaintiffs argue that the ALJ and the Deputy Secretary misinterpreted the conformance procedures set forth at 29 C.F.R. 4.6(b)(1982), as amended (1983).[4] The applicable regulations provide that any class of service employee not listed on the wage determination should be classified by the contractor and paid a wage rate and fringe benefits determined by the contracting agency, the contractor and the employees. Kirchdorfer interpreted this regulation to mean that each time a new employee accepted a position not listed on the wage determination, new wage rates and fringe benefits would be negotiated. The agency's interpretation of the regulation is that once a class of service employees

[4] The 1982 regulations were in effect when the relevant government contract was awarded.

and an accompanying wage rate and fringe benefit is agreed upon, it is incorporated into the contract and becomes conformed so that any new employee would assume the same classification, wages, and benefits.

The agency's construction of the regulation is reasonable and must be given controlling weight. Chevron U.S.A. Inc., supra. The ALJ found that Kirchdorfer had been informed repeatedly of the agency's interpretation of 29 C.F.R. Part 4 and yet refused to follow it, insisting instead that his unsubstantiated interpretation was correct. It was not erroneous for the ALJ to find that oral communication of the agency's policies was sufficient notice, in lieu of a formal written opinion.

It was not error for the ALJ to disregard time records not before the ALJ.

Plaintiffs argue that unusual circumstances exist which would warrant relief from the debarment sanction imposed by the Comptroller General. 29 C.F.R. § 4.188(b)(1). Plaintiffs argument has been extensively addressed in an earlier memorandum opinion, dated March 1, 1989, dismissing plaintiffs' claim for injunctive relief and will not be reiterated here.

The motion of the plaintiffs, Joseph C. Kirchdorfer and Skip Kirchdorfer, Inc., for summary judgment will be denied. The motion of the defendant, Elizabeth Dole, in her capacity as Secretary of the U. S. Department of Labor, for summary judgment will be granted.

An appropriate order has been entered this 26th day of May, 1989.

THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to counsel

ENTERED May 26, 1989
Jesse W. Grider, Clerk
By: _____
Deputy Clerk

U. S. DEPARTMENT OF LABOR
Deputy Secretary of Labor
Washington, D.C.
20210

DATE: September 28, 1988
CASE NO. 83-SCA-11

IN THE MATTER OF

JOSEPH C. KIRCHDORFER
d/b/a SKIP KIRCHDORFER, INC.,
RESPONDENT.

BEFORE: THE DEPUTY SECRETARY OF LABOR [1]

FINAL DECISION AND ORDER

This case is before me under the Service Contract Act of 1965, as amended (SCA or the Act), 41 U.S.C. §§ 351-358 (1987), and the regulations at 29 C.F.R. Part 4 (1987). Respondent seeks review of the decision and order (D. and O.)

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[1] The Deputy Secretary has been designated by the Secretary to perform the functions of the Board of Services Contract Appeals pending the appointment of a duly constituted Board. 29 C.F.R. § 8.0 (1987); Department of Labor Executive Level Conforming Amendments of 1986, Pub. L. No. 99-619 (November 6, 1986).

issued by Administrative Law Judge (ALJ) James W. Kerr, Jr., on November 23, 1986.

This case involves military housing maintenance at two separate military installations under two contracts with the Air Force: the first running from November 1, 1980, to October 31, 1982, at Patrick Air Force Base in Florida, and the second at Maxwell-Gunter Air Force Base in Alabama from October 1, 1981, to September 30, 1982, and extended until September 30, 1984.

Both contracts required that vacation be paid after a specified length of service "with a contractor or successor," and that "Length of Service includes the whole span of continuous service with the present (successor) contractor, wherever employed, and with predecessor contractors in the performance of similar work at the same Federal facility."

Complainant's Exhibits 1 and 2 (emphasis supplied).

At issue are the first contractual year's vacation eligibility for one employee at Patrick Air Force base and three employees under the Maxwell-Gunter contract, and whether Respondent's refusal to credit these employees with service from the predecessor contract violated the Act. The ALJ ruled that it did, as follows:

> 2. Respondent's practice of not treating as "continuous" any employee not hired within the first payroll period does not withstand the dictates of the regulations. According to the regulations, all the facts in the particular case must be examined, and the primary factor in determining whether there has been a break in service is the reason for the employee's absence from work. An arbitrary time period of five or less working days prohibits any due consideration of the particular facts of the case and the reasons for the absence.
>
> 3. Because the weight of the evidence supports the conclusion that Respondent intended for each of the predecessor's employees to continue working under Respondent's contracts, it is the Court's

finding that the alleged break in service was no more than a "temporary lay off." Consequently, even if the employee was hired subsequent to the Respondent' s first payroll period, the employee may still be a continuous employee for purposes of vacation entitlement. See 29 C.F.R. § 4.173 (b) (2) (1985).

D. and O. at 9 (emphasis in original).

Respondent had further claimed that one employee, Neal O'Donnell, had been paid one week's vacation. The ALJ did not agree, as follows:

5. Respondent has alleged that its exhibit "E", a check issued to O'Donnell in the amount of one week's pay, represents the disputed one week of vacation entitlement. However, O'Donnell testified that he received "two weeks twice." (TR 151). Also, Respondent's own records indicate that O'Donnell has worked during the payroll period which the check represented. (RX-1). Accordingly, there is no evidence to substantiate vacation pay due the employee over and above the employee's regular wages for the week of work.

D. and O. at 11, 12.

Respondent alleged that the ALJ "disregarded" evidence regarding vacation payment to employee O'Donnell. The ALJ's

findings were based on his consideration of this evidence and his evaluation of the credibility of the witnesses. D. and O. at 11, 12.

Respondent also objects to the receipt of post-hearing evidence with regard to the vacation pay claim of employee Krzynowek. It was proper for the ALJ to permit such evidence regarding an issue not raised before the hearing. As the Administrator's brief notes, Respondent does not refute the authenticity of the post hearing documents which supported the Administrator's position and the ALJ's finding. Statement for the Administrator at 47, n.7. Respondent made the unsubstantiated claim that he had previously advised the Department of Labor about his method for computing vacation pay eligibility, which resulted in these violations, and that he

had been told, "to set a policy and be consistent." Hearing Transcript (T.) at 218. If such "advice" were given it is "not a defense against a contractor's liability for back wages under the Act." See 29 C.F.R. § 4.187(e) (5).

The ALJ made his finding and reached his conclusion on this issue based on his evaluation of the evidence presented and his judgement of the credibility of the witnesses who testified before him. I adopt his findings of fact and conclusions on the vacation pay issue as being supported by a.preponderance of the evidence and in accordance with law. See 41 U.S.C. § 353; Midwest Maintenance and Construction Co. v. Vella, 621 F.2d 1046, 1048; American Waste Removal v. Donovan, 26 WH Cases 1591, 1593 (10th Cir. 1984).

The ALJ found that two air conditioning mechanics, Johnny Milham and James

Rudolph, who worked afternoon shifts and on weekends, were entitled to overtime pay they had not received, based on their testimony and that of two compliance officers who had inspected the available "sign-in sheets" record. The ALJ's conclusions were as follows:

26. As to the employees Johnny Milham and James Rudolph, both evening air conditioning maintenance workers, the most accurate record of their number of hours actually worked was the service call cards. A service call cards or work order card, showed the address of the unit, the signature of the occupant and the time of performance of the week in question. (TR. 54, 57-58, 258, 292). However, these service call cards were not introduced into evidence. Mr. Kirchdorfer asserted that the cards are the property of the Maxwell Air Force Base. It is noted that Respondent admitted that these cards were the most accurate reflection of the hours worked by Mr. Milham and Mr. Rudolph, but were not used for payroll purposes or timekeeping. (TR. 292-293).

27. Upon their initial hire as air conditioning maintenance workers, Mr. Milham and Mr. Rudolph diligently signed in upon arriving at work and signed out upon departing. During the initial period of employment, these sign-in sheets accurately reflected the number of

hours they worked. (TR. 55-57, 111-113). After a "month or so," Mr. Bradley informed Mr. Milham that he need not sign-in any longer because Milham would be paid for forty hours of work per week regardless of the hours reflected on the sign in sheets. Thereafter, Mr. Milham was less consistent about signing in. Similarly, Charles Clark, who had hired Mr. Rudolph, informed Mr. Rudolph that there was no longer a need to sign in, as he would not be paid for any hours in excess of forty per week. (TR. 109-112). At this point, Mr. Rudolph discontinued signing in.

28. Based upon Mr. Makowsky's computations in Complainant's exhibits 13, 14 and 15, it is apparent that Respondent did not use the sign-in sheets as a basis for the number of hours worked by Messrs. Milham and Rudolph. Nevertheless, it is the finding of this Court that the sign-in sheets are an accurate reflection of the minimal hours worked by Mr. Milham, since he continued to sign in, though less consistently.

D. and O. at 7.

Johnny Milham

1. Milham, a Maxwell employee, was hired by Respondent as an air conditioning mechanic in July of 1983 to perform evening and weekend work. It was Mr. Milham's testimony that he worked generally from 3:00 or 4:00 pm. until 12:00 or 1:00 a.m. Monday through Friday, and also during the days on Saturday and Sunday.

2. As was previously stated in paragraph 27, Mr. Milham consistently signed in and out during his initial period of employment until he was told by Mr. Bradley that there was no need to sign in, since he was going to paid for only forty hours per week of work. (TR. 55). Notwithstanding the fact that Mr. Milham signed in less consistently toward the latter period of his employment, the sign-in sheets accurately represent the number of hours Mr. Milham worked during his initial period of employment. (TR. 56). In any event, the hours logged on the sign-in sheets reflect the minimum hours which Mr. Milham worked each week.

3. Mr. Milham testified at the hearing that he worked anywhere between fifty and seventy hours per week. (TR. 68). This estimation comports with the sign-in sheets which were used by the compliance officer to compute the wages due to Mr. Milham. (CX-14).

4. The wage transcription and computation sheet completed by Mr. Makowsky relative to Mr. Milham evinces the fact that the Respondent consistently paid Mr. Milham for approximately forty hours of work per week, despite the fact that the employee consistently logged in greater than forty hours per week on the sign-in/sign-out sheets. (CX-14). Consequently, Mr. Milham is due backwages for the hours he worked in excess of the forty hours per week for which he was paid. This amounts to a total of $969.38. (CX-14).

5. Upon comparison of Respondent's certified payroll records with the hours reflected on the sign-in/sign-out sheets, it is evident that Respondent's payroll records were grossly inaccurate. The certified payroll records reflect that Mr. Milham never worked on Saturdays or Sundays. To the contrary, the evidence of record substantiates the fact that Mr. Milham was hired to work weekends and did regularly work on the weekends. (CX-14: TR. 52-54).

James Rudolph

1. Mr. Rudolph was hired by Respondent as an air conditioning mechanic under the Maxwell contract. Upon being hired, he was told by Charles Clark that he would earn $8.56 per hour and would work forty hours per week. (TR. 109-110).

2. In actuality, Mr. Rudolph was required to work seven days per week, working similar shift hours as Mr. Milham, 4:00 p.m. to 12:00 midnight Monday through Friday plus weekends.

3. As did Mr. Milham, Mr. Rudolph consistently logged his hours on the sign-in/sign-out sheets during the initial period of his employment. Thereafter, Mr. Clark informed him that there was no need to sign in because he would not be paid for overtime work. (TR. 111-112).

4. Because no basic payroll or time records were available to Mr. Makowsky during his second investigation of Respondent, Mr. Makowsky reconstructed the number of hours Mr. Rudolph had

worked. (TR. 190-191, 203-204). Following his personal interview with Mr. Rudolph, Mr. Makousky computed the backwages which were due Mr. Rudolph for overtime work. These computations were based upon Mr. Rudolph working minimally fifty-five hours per week for 75% of the weeks which he worked for Respondent. Respondent in fact paid Mr. Rudolph for forty hours of work per week. (TR. 203; CX-15).

5. Mr. Rudolph is due backwages totalling $2,781.00 for hours worked overtime during his employment with Respondent. (CX-15). These computations are supported by testimony at the hearing that Mr. Rudolph generally worked seven days per week, with his shortest work week consisting of fifty-five hours of work. (TR. 110-111).

D. and O. at 12-14.

Respondent argued the reliability of the employees' testimony, but he provided no substantiation of the actual hours he claimed the employees had worked.

The ALJ concluded that another employee, Nelson Longcrier, had been misclassified as a supply clerk at the rate of $6.00 per hour while performing quality control work at $10.25 per hour,

25% of the time. The ALJ credited the employee's testimony over that of Respondent, as follows:

Nelson Longcrier

1. Mr. Longcrier was hired by Respondent under the Maxwell contract as a supply clerk at a rate of $6.00 per hour. (RX-L). This was the proper contractual conformed rate for a supply clerk. (CX-11).

2. However, Mr. Longcrier eventually began performing quality control work. Mr. Longcrier attested at the hearing that he performed supply clerk duties and those of quality control conjointly. (TR. 168-169). The contractual conformed rate for quality control was $10.25 per hour. (CX-3 and 5).

3. The court finds that the evidence of record supports the assertion that Mr. Longcrier performed quality control work in addition to supply work. According to Mr. Longcrier, each morning Mr. Clark, another quality control worker, would present him with a list of houses requiring inspection. (TR. 169). The testimony of Ms. Chodnicki corroborates Mr. Longcrier's involvement in quality control work. (TR. 97-98).

4. Mr. Makowsky's computation of monies due Mr. Longcrier are based upon the employee spending 25% of his time performing quality control work. This percentage is supported by Mr. Longcrier's testimony which indicated

that he spent between 25% to 50% of his time in the performance of quality control work.

5. Consequently, Mr. Longcrier is due the sum of $935.00 as a result of Respondent's misclassification of the employee. This amount represents 25% of Mr. Longcrier's time as a quality control worker. (TR. 202; CX-15).

D. and O. at 7.

With respect to the claim concerning employees Milham, Rudolph, and Longcrier, I rely on the ALJ's credibility determinations and affirm his findings of fact and conclusions. The ALJ is uniquely qualified to make credibility determinations, N.L.R.B. v. Jacob E. Decker and Sons, 569 F.2d 357, 364 (5th Cir. 1978), and since resolution of this issue depends on witness credibility, special deference must be paid to the ALJ's conclusion. Center Property Management v. N.L.R.B., 807 F.2d 1264, 1268 (5th Cir. 1987). See also N.L.R.B. v. Walton Mfg. Co., 398 U.S. 404, 408

(1962), and the Secretary's decision in McDaniel v. Boyd Brothers Transportation, Case No. 86-STA-6 (March 16, 1987), slip op. at 3.

The third issue concerns the ALJ's finding that Respondent had violated the Act by failing to pay the required wage rates to six employees working in conformed job classifications. The ALJ's findings of fact and conclusion were as follows:

Conformed classification and Wages

1. The following conformed classes and corresponding minimum wage rates were properly confected and incorporated into the Maxwell Contract by amendment:

Service Call Clerk	$ 6.00 per hour	(CX-4)
Desk Clerk	$ 5.00 per hour	(CX-4)
Chief Clerk	$ 7.50 per hour	(CX-5)
Quality Control	$10.25 per hour	(CX-5)
Service Call Clerk	$ 7.06 per hour	(CX-6)

2. Upon the incorporation of the conformed classes and minimum wage rates into the Maxwell contract, Respondent was required to pay subsequent employees hired into the conformed class the specified minimum wage. (CX-2; TR. 83, 206; 29 C.F.R. § 4.6(b) (2) (i) and §

4.6(b)(2)(i)(v) (1985)). It is explicitly stated in the regulations that, once the conformed class and rate are determined pursuant to the specified conforming procedure, this wage rate must be paid to all employees performing in the classification from the first day on which contract work is performed by them in the classification. Furthermore, failure to pay the employees the compensation agreed upon by the "interested parties" and/or finally determined by the Wage and Hour Division shall be a violation of the Act and this contract. The "interested parties" include the contractor, the employee and the contracting officer. (29 C.F.R. § 4.6(b) (2) (ii) (1985)).

3. Despite the mandate of the regulations, Respondent testified at the hearing that he unilaterally lowered the conformed wage rate for subsequently hired employees without the approval of the contracting officer, paying the wage rate he thought was commensurate with the particular employee's qualifications and experience. (TR. 253-284, 287).

4. Respondent was required per the regulations and the contract to pay employees subsequently hired into the conformed class the agreed upon minimum wage rate as incorporated into the contract. This requirement was discussed with Mr. Kirchdorfer and Respondent's project managers on numerous occasions. (See paragraphs 20, 21, and 29).

D. and O. at 14.

20. On at least three occasions, Gary Williams, a compliance officer with the Wage and Hour Division, explained to and discussed with Mr. Kirchdorfer the issue of conforming rates. Mr. Williams described the procedure which must be used to conform a classification of employees and minimum wage rate. He further explained that, once the rate is agreed upon by the contractor, employee and contracting officer, it becomes part of the contract, and employees subsequently hired into this position must be paid the agreed upon rate. (TR. 74, 80-83).

21. Additionally, Peggy Jolly, the contract administrator who was responsible for the Maxwell contract, personally met with Sidney Bradley and Charles Clark, both supervisory personnel of Respondent under the Maxwell contract, and explained to them the proper conformance procedures. She also advised them of the necessity of posting the conformed rates along with the wage determination. (TR. 172, 179-180). As the Respondent's manager, Mr. Bradley had the full authority to act on behalf of the Respondent. (TR. 187).

D. and O. at 5, 6.

29. Referring to paragraphs 8, 9 and 10, it is established that the conformance classifications and minimum wage rates had been incorporated into the Maxwell contract for desk clerk, service call clerk, quality control, chief clerk and service call clerk. It has also been established that on several occasions, the conformance procedure and the

requirement of paying subsequently classified employees the determined conformed rate were discussed with Mr. Kirchdorfer. (See paragraphs 20 and 21). Notwithstanding his knowledge, Mr. Kirchdorfer attempted to pay subsequently classified employees a lesser wage than the conformed rate.

30. According to Ms. Jolly, the contract administrator, the respondent was advised that if a new wage determination was incorporated into the contract, Respondent was to invoice her office for increased costs under the new wage determination. Consequently, Respondent submitted invoices to the office which included increased costs for a quality control and service call clerk. Ms. Jolly discovered, though, that respondent was not paying the employees the con formed rates previously incorporated into the contract, whereupon her office returned the invoices and advised Mr. Kirchdorfer to correct the invoices.

(TR. 177-178; CX-11) Ms. Jolly's office could not reimburse Respondent for the invoices because Respondent was paying less than it was billing. (TR. 178).

31. It was the testimony of Ms. Jolly that each time a conformed classification position was vacated, Respondent would then submit a conforming rate at a lower rate that was originally conformed. (TR. 174). Respondent did not refute this contention. Rather, Mr. Kirchdorfer corroborated it by stating at the hearing that any time he hired a new employee per an established classification, he had the authority to change the wage rate based

upon his judgment as to the employee's qualifications and experience. (TR. 283-284, 287). Mr. Kirchdorfer further claimed that Ms. Jolly at no time informed him that his belief was incorrect. However, the court finds that evidence overwhelmingly establishes that Mr. Kirchdorfer was aware that he could not lower the wage rate at his own discretion. That he was required to pay the conformed rate was explained to him on numerous occasions by Mr. Williams and Ms. Jolly. (See paragraphs 20 and 21). This requirement was also contained in the Maxwell contract. (See paragraph 12).

D. and O. at 7, 8.

Charles Clark

1. Mr. Clark, an employee of the Respondent at Maxwell-Gunter Air Force Base, was hired to perform quality control work at a rate of $9.00 per hour. (RX-J).

2. The contractual conformed rate for quality control was $10.25 per hour. (CX-3 and 5).

3. Respondent failed to pay Mr. Clark the required minimum wage rate. Therefore, Mr. Clark is due the sum of $3,820.76 as

a result of Respondent's violations.[4] (CX-10, 11 and 15).

John Davis

1. Mr. Davis was initially hired by Respondent at Maxwell-Gunter Air Force Base as a service call clerk. During the last month of his employment with Respondent, Davis performed quality control work. That Mr. Davis performed this type of work is supported by his description at the hearing of his duties. (TR. 120-123). This Court rejects Mr. Kirchdorfer's assertion that Mr. Davis performed no quality control work. Mr. Davis testified that Charlie Clark, another quality control worker, instructed him as to the responsibilities the position entailed. (TR. 126). Also, Mr. Davis stated that he would inspect

[4] The fact that Respondent alleges to have additionally paid Mr. Clark $240.00 per month for housing rent is of no avail. The regulations provide that the employer may include as part of the applicable minimum wage the reasonable cost, as determined by the Administration, of furnishing an employee with "board, lodging, or other facilities" in situations where such facilities are customarily furnished to employees for the convenience of the employees. (29 C.F.R. § 4.167 (1985)). Respondent in the case at bar offered no evidence that this was a situation where "such facilities are customarily furnished to employees." Moreover, such cost for rent has not been approved by the Administrator or his authorized representative.

the houses after the maintenance work had been done, rather than before. (TR. 122-123). Thus, there is ample evidence supporting the assertion that Mr. Davis performed quality control work during one month of employment with Respondent.

2. The contractual conformed rate for quality control was $10.25 per hour. (CX-3 and 5).

3. Respondent failed to pay Mr. Davis the required minimum wage rate. Therefore, Mr. Davis is due the sum of $293.09 as a result of Respondent's violations. (CX-10, 11, and 15). This computation is based upon one month of quality control work.

Hal Jones

1. Mr. Jones, an employee of the Respondent at Maxwell-Gunter Air Force Base, was hired to perform quality control work at a rate of $10.00 per hour. (RX-K; CX-12).

2. The contractual conformed rate for quality control was $10.25 per hour. (CX-3 and 5).

3. Respondent failed to pay Mr. Jones the required minimum wage rate. Therefore, Mr. Jones is due the sum of $190.00 as a result of Respondent's violations. (CX-10 and 15).

Angela Smith

1. Ms. Smith was hired by Respondent under the Maxwell contract as a desk clerk at a rate of $4.00 per hour. (CX-15).

2. The contractual conformed rate for a desk clerk was $5.00 per hour. (CX-4).

3. Respondent failed to pay Ms. Smith the required minimum wage rate. Therefore, Ms. Smith is due the sum of $955.48 as a result of Respondent's violations.
(CX-15).

Julie Tatum

1. Ms. Tatum was hired by Respondent under the Maxwell contract as a desk clerk at a rate of $4.00 per hour. (CX-15).

2. The contractual conformed rate for a desk clerk was $5.00 per hour. (CX-4).

3. Respondent failed to pay Ms. Tatum the required minimum wage rate. Therefore, Ms. Tatum is due the sum of $905.86 as a result of Respondent's violations.
(CX-15).

Christine Chodnicki

1. According to Respondent's records, Ms. Chodnicki was hired under the Maxwell contract as a desk clerk at the rate of $5.00 per hour. (RX-A). However, upon applying for a job, Ms. Chodnicki specifically applied for the position of service call clerk. She was told by

Charlie Clark that service call clerk was the title of the position for which she was hired. (TR. 89).

2. Ms. Chodnicki's description of the work she performed supports the Court's conclusion that her duties were those of a service call clerk, rather that a desk clerk. She was trained by John Davis, who was initially employed as a service call clerk. (TR. 89-90). Her responsibilities involved taking the telephonic requests for maintenance, completing the work orders and assigning the work orders to the maintenance men. (TR. 89-91).

3. The contractual conformed rate for service call clerk was $7.06 per hour. (CX-6).

4. As a result of Respondent's misclassification of Ms. Chodnicki, she is due the sum of $2,224.80, representing wages for work as a service call clerk. (CX-15).

D. and O. at 15-17.

Respondent has argued that although initially conformed under the contract, each classification subsequently changed with the assignment of new and supposedly lesser experienced employees. To implement this adjustment, Respondent notified the contracting agency of each

new employee's assignment and a decreased wage rate.

The agency notified Respondent that the conformed wage rates did not change unless the duties of the position classification changed. Respondent apparently elected to ignore the agency's repeated rejection of his attempts to lower wage rates already established for specific conformed position classifications, and in each case paid the new position holder less than the conformed rate for the job classification.

Citing for authority, White Glove, Inc. v. Brennan, 518 F.2d 1271 (9th Cir. 1975), Respondent argued that he had testified without rebuttal that when this question came up in connection with a previous contract in Illinois that the objection was abandoned by the

government, and that the ALJ had "improperly disregarded this testimony without providing a detailed explanation." Respondent's Petition for Review at 5. Respondent's testimony evidence here, which frankly is difficult to identify in the record, is quite different from White Glove where the "rejected testimony" consisted of letter exhibits and recorded and live testimony "sufficient to establish a strong prima facie case in the absence of contradiction or impeachment," so that the ALJ's rejection there could be termed "arbitrary." 518 F.2d at 1276. A careful review of the record in this case establishes that the ALJ acted properly, not arbitrarily. His findings and conclusions are well-supported by the evidence and I adopt them on this issue. Conformed wage rates, once established,

do not fluctuate simply according to the various experience levels of employees assigned to the positions.

Finally, the ALJ found that there were no unusual circumstances present in this case to warrant Respondent's relief from the debarment sanction. He stated his conclusion as follows:

4. This Court finds that there are no unusual circumstances to warrant Respondent's relief from the debarment sanction. Respondent's violations of the Service Contract Act and the Contract Work Hours and Safety Standards Act were of a deliberate nature, as Mr. Kirchdorfer had knowledge of the Act's requirements of recordkeeping, conforming procedures and payment of the conformed minimum wage rate; (See paragraphs 20, 21 and 29); Respondent was investigated on three separate occasions relative to the Maxwell-Gunter Air Force Base Contract; (TR. 189-190); there was a lack of cooperation on the part of Mr. Kirchdorfer throughout these investigations, as shown by his failure to provide accurate bookkeeping records and his failure to respond to either of Mr. Makowsky's certified letters or his phone calls; (See paragraph 24); there were investigations by the Wage and Hour Division into alleged violations of Respondent prior to the Maxwell contract which resulted in an injunction against

the Respondent in the 1960's. Mr. Williams, one of the compliance officers, stated that the Respondent had a "considerable investigative history." (TR. 79).

D. and O. at 19.

Citing 29 C.F.R. § 4.188(a) (1985), the ALJ stated that "the violator of the Act has the burden of establishing the existence of unusual circumstances to warrant relief from the debarment sanction." D. and O. at 18. The ALJ then properly applied the promulgated guidelines, found at 29 C.F.R. § 4.188(b)(3) (i) and (ii) (1985), to determine the existence of unusual circumstances:

(3)(i) The Department of Labor has developed criteria for determining when there are unusual circumstances within the meaning of the Act. . . Thus, where the respondent's conduct in causing or permitting violations of the Service Contract Act provisions of the contract is willful, deliberate or of an aggravated nature or where the violations are a result of culpable conduct such as culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to

comply with recordkeeping requirements (such as falsification of records), relief from the debarment sanction cannot be in order. Furthermore, relief from debarment cannot be in order where a contractor has a history of similar violations, where a contractor has repeatedly violated the provisions of the Act, or where previous violations were serious in nature. (ii) A good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance are generally prerequisites to relief. Where these prerequisites are present and none of the aggravated circumstances in the preceding paragraph exist, a variety of factors must still be considered, including whether the contractor has previously been investigated for violations of the Act, whether the contractor has committed recordkeeping violations which impeded the investigation, whether liability was dependent upon resolution of a bona fide legal issue of doubtful certainty, the contractor's efforts to ensure compliance, the nature, extent, and seriousness of any past or present violations, including the impact of violations on unpaid employees, and whether the sums due were promptly paid.

D. and O. at 18.

Respondent argues that "debarment is an excessive punishment" because "the errors are such a small part of the overall contracts," citing for support Federal

Food Service, Inc., v. Donovan, 658 F.2d 830 (1981). Respondent's Petition for Review at 26.

In Federal Food Service, Inc., the ALJ had placed his finding of improper management solely on the basis of "virtually 'de minimus' underpayments." That is not the case here. Here the ALJ concluded that the violation resulted from deliberate actions of the Respondent. At the least, I find that the violations were the result of Respondent's culpable neglect to ascertain whether his practices were in violation of the Act and his culpable disregard of whether they were in violation. Accordingly, I adopt the conclusion of the ALJ that unusual circumstances are not present which would warrant relief from the debarment sanction.

In his argument, Respondent alleged the existence of two "bona fide legal issues of doubtful certainty" as follows:

> Most significantly, however, is the existence of two bona fide legal issues of doubtful certainty: to what extent is an initial conformance rate imposable upon subsequent interested parties under 29 C.F.R. § 4.6(b); and what objective standards do the regulations provide by which an employer may ascertain when an employee of a former contractor is not a continuous employee.

Respondent's Petition for Review at 25.

Respondent is required to pay the approved rate to every employee in a conformed job classification in accordance with the provisions of 29 C.F.R. § 4.6(b) (2) (1983).[5] This obligation was repeatedly confirmed to Respondent by representatives of the Department of Labor and the contracting agency, whose testimony at the hearing

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[5] Part 4 of 29 C.F.R. was amended, effective December 27, 1983. 48 Fed. Reg. 49,762 (1983).

was unrefuted. Respondent does not have the option of unilaterally adopting lower rates for classifications which have already been incorporated into a wage determination, and then ignoring payment to employees by claiming disagreement with an alleged "legal issue."

The record does not reflect that Respondent intended to establish new position classifications; only to lower the rates for existing classifications. When Respondent was told he could not do so, there is no evidence he challenged the agency's response. He only continued to pay the lower rates. T. at 179. If an employer could avoid or defer proper payment to employees simply by alleging a "legal disagreement" with the contracting agency, after it was discovered that employees were being paid less than was required by the wage determination, there

could not be adequate enforcement of the Act. An employer who adopts such a course to circumvent the regulations has violated the Act. As the ALJ has ruled, such conduct is willful or "deliberate". At the least, it evidences culpable disregard of whether or not Respondent was in violation of the Act.

Neither can Respondent's argument that there was a bona fide legal issue of doubtful certainty as to the determination of who is a continuous employee under a successor contract withstand scrutiny. This was not so much a legal question, as examined by the ALJ, as it was a question of whether Respondent's testimony on the employment history of the respective employees was credible. The ALJ did not find it so, and the record supports his conclusion that "the alleged break in service was no

more than a 'temporary layoff,'" and, consequently, that there was no break in continuous service for calculating vacation payment. D. and O. at 9.

Thus, neither claim represents a bona fide legal issue of doubtful certainty. Respondent has the burden for complying with the Act, and responsibility for his failure to do so cannot be shifted to the Government. Here, as in United States v. Powers Building Maintenance Co., 336 F. Supp. 819, 822 (W.D. Okla. 1972), the ALJ

> was required to choose between conflicting versions of the true situation. The credibility of witnesses relied upon by the Hearing Examiner in arriving at his findings is his exclusive function, and his findings can be overruled only where, on the basis of the record, they were clearly incorrect.

In this case there also is evidence of culpable failure to maintain proper records, in particular for overtime pay purposes. See supra at 4-7; D. and O. at 6-7.

Respondent did not promptly repay his employees and the record supports the ALJ's findings that Respondent failed to cooperate in the investigation.

Respondent did not return telephone calls nor respond to letters from the Department of Labor. T. at 233. The record provides no evidence of Respondent's assurances of future compliance. Thus, Respondent has failed to carry his burden of establishing the existence of unusual circumstances as contemplated by the Act and the guidelines at 29 C.F.R. § 4.188(a) (3) (i) and (ii).

I find that the ALJ's decision regarding the substantive violations was correct and I AFFIRM his order that Respondent pay to the Employment Standards Administration $15,135.54, representing underpayment to employees,

plus the interest which has accrued on the wages and vacation benefits. The United States Air Force should release all monies currently withheld from Respondent for this purpose.

I also ADOPT the ALJ's recommended finding that there are no unusual circumstances to justify relief for Respondent from being placed on the list of ineligible bidders, pursuant to Section 5(a) of the Act. The Comptroller General shall be notified accordingly.

SO ORDERED.

Dennis E. Whitfield
Deputy Secretary of Labor

Washington, D.C.

5 U.S.C. § 706:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall - -

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be - -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

* * *

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute.

* * *

41 U.S.C. § 352:

Violations

(a) Liability of responsible party; withholding payments due on contract; payment of underpaid employees from withheld payments

Any violation of any of the contract stipulations required by section 351(a)(1) or (2) or of section 351(b) of this title shall render the party responsible therefore liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract.

(b) Enforcement of section

In accordance with regulations prescribed pursuant to section 353 of this title, the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.

41 U.S.C. § 354:

List of violators; prohibition of contract award to firms appearing on list; actions to recover underpayments; payment of sums recovered

(a) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this chapter. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms.

* * *

29 C.F.R. § 4.6:

Labor standards clauses for Federal service contracts exceeding $2,500. (1982)

* * *

(b)(1) Each service employee employed in the performance of this contract by the contractor or any subcontractor shall be paid not less than the minimum monetary wage and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor or his authorized representative, as specified in any attachment to this contract.

(2) If there is such an attachment, any class of service employees which is not listed therein, but which is to be employed under this contract, shall be classified by the contractor so as to provide a reasonable relationship between such classifications and those listed in the attachment, and shall be paid such monetary wages and furnished such fringe benefits as are determined by agreement of the interested parties, who shall be deemed to be the contracting agency, the contractor, and the employees who will perform on the contract or their representatives. If the interested parties do not agree on a classification or reclassification which is, in fact, conformable, the contracting officer shall submit the question, together with his recommendation, to the Office

of Government Contract Wage Standards, Wage and Hour Division, ESA, of the Department of Labor for final determination. Failure to pay such employees the compensation agreed upon by the interested parties or finally determined by the Administrator is his authorized representative shall be a violation of this contract.

* * *

(k)(1) If there is a wage determination attached to this contract and one or more classes of service employees which are not listed thereon are to be employed under the contract, the contractor shall report to the contracting officer the monetary wages to be paid and the fringe benefits to be provided each such class of service employee. Such report shall be made promptly as soon as such compensation has been determined as provided in the clause in paragraph (b) of this section.

29 C.F.R. § 4.171:

Meeting requirements for particular fringe benefits. (1982)

* * *

(b)(2) Some questions have been raised about the application of provisions appearing in some fringe benefit determinations which call for "1 week paid vacation after 1 year of service with a contractor or successor." To determine when an employee meets the "after 1 year of service" test, an employer must take two factors into consideration: (i) the total length of time an employee has been in the employer's service, including both the time he has been performing on regular commercial work and the time he has been performing on the Government contract itself, and (ii) the total length of time an employee has been employed either by the present contractor or predecessor contractors in the performance of similar work on the same base.

* * *

(b)(3) Where, however, a fringe benefit determination requires 1 week's paid vacation per year after 1 year's service with an employer, no employee, temporary or permanent, with less than 1 year's service with the contractor, whether or not he was working on the contract, would qualify for this benefit.

29 C.F.R. § 4.173:

Meeting Requirements for Vacation Fringe Benefits. (1988).

(b) Eligibility requirement - continuous service.

* * *

Service must have been rendered continuously for a period of not less than one year for vacation eligibility. The term "continuous service" does not require the combination of two entirely separate periods of employment. Whether or not there is a break in the continuity of service so as to make an employee ineligible for a vacation benefit is dependent upon all the facts in the particular case. No fixed time period has been established for determining whether an employee has a break in service.

* * *

29 C.F.R. § 4.187:

Recovery of underpayments. (1988).

(a) The Act, in section 3(a), provides that any violations of any of the contract stipulations required by sections 2(a)(1), 2(a)(2), or 2(b) of the Act, shall render the party responsible liable for the amount of any deductions, rebates, refunds, or underpayments (which includes non-payment) of compensation due to any employee engaged in the performance of the contract. So much of the accrued payments due either on the contract or on any other contract (whether subject to the Service Contract Act or not) between the same contractor and the Government may be withheld in a deposit fund as is necessary to pay the employees. In the case of requirements-type contracts, it is the contracting agency, and not the using agencies, which has the responsibility for complying with a withholding request by the Secretary or authorized representative. The Act further provides that on order of the Secretary (or authorized representatives), any compensation which the head of the Federal agency or the Secretary has found to be due shall be paid directly to the underpaid employees from any accrued payments withheld.

* * *

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* * *

29 C.F.R. § 4.188:

Ineligibility for further contracts when violations occur. (1988).

(a) Section 5 of the Act provides that any person or firm found by the Secretary or the Federal agencies to have violated the Act shall be declared ineligible to receive further Federal contracts unless the Secretary recommends otherwise because of unusual circumstances.

* * *

No contract of the United States or the District of Columbia (whether or not subject to the Act) shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until 3 years have elapsed from the date of publication of the list containing the names of such persons or firms.

* * *

(b)(1) The term "unusual circumstances" is not defined in the Act. Accordingly, the determination must be made on a case-by-case basis in accordance with the particular facts present.

* * *

(3)(i) The Department of Labor has developed criteria for determining when there are unusual circumstances within the meaning of the Act.

* * *

Where the respondent's conduct in causing or permitting violations of the Service Contract Act provisions of the contract is willful, deliberate or of an aggravated nature or where the violations are a result of culpable conduct such as culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements (such as falsification of records), relief from the debarment sanction cannot be in order. Furthermore, relief from debarment cannot be in order where a contractor has a history of similar violations, where a contractor has repeatedly violated the provisions of the Act, or where previous violations were serious in nature.

(ii) A good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance are generally prerequisites to relief. Where these prerequisites are present and none of the aggravated circumstances in the preceding paragraph exist, a variety of factors must still be considered, including whether the contractor has previously been investigated for violations of the Act, whether the contractor has committed recordkeeping violations which impeded the investigation, whether liability was dependent upon resolution of a bona fide legal issue of doubtful certainty, the contractor's efforts to ensure compliance, the nature, extent, and seriousness of any past or present violations, including the

impact of violations on unpaid employees, and whether the sums due were promptly paid.

(4) A contractor has an affirmative obligation to ensure that its pay practices are in compliance with the Act, and cannot itself resolve questions which arise, but rather must seek advice from the Department of Labor.

* * *